No. 20390

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. BATES BUTLER, as Trustee of CONSTRUCTION MATERIALS CO.,

Appellant,

vs.

CITY OF TUCSON, et al.,

Appellees.

MARTIN CONSTRUCTION CO. and PACIFIC NATIONAL INSURANCE CO.,

Appellants,

vs.

BANK OF TUCSON, et al.,

Appellees.

On Appeal from The United States District Court for the District of Arizona

REPLY TO ANSWERING BRIEF OF APPELLEES, PACIFIC NATIONAL INSURANCE COMPANY AND MARTIN CONSTRUCTION COMPANY AND OF APPELLANT, A. BATES BUTLER, ON CROSS-APPEAL OF THE BANK OF TUCSON

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A R G U M E N T

It is obvious from the previous briefs filed herein on the Bank's cross-appeal that there is a split of authority as to the allowance as attorneys' fees of a specific percentage or amount stipulated in a promissory note.

As previously pointed out by the cross-appellant Bank, in its Opening Brief on Cross-Appeal, the Supreme Court of the State of Arizona in several cases, notably, Mayo v. Ephrom, 84 Ariz. 169, 325 P.2d 814, and Pioneer Construction v. Symes, 77 Ariz. 107, 267 P.2d 740, has adopted the rule that in the absence of a tender of an issue

of unreasonableness of the stipulated percentage and the introduction by the defendant of evidence of unreasonableness, the stipulated percentage of the amount found to be due upon a promissory note should be allowed as attorneys' fees. As has been pointed out by cross-appellee Trustee in his Opening Brief, the law of the State of Arizona is governing here. Erie Railroad v. Thompkins, 304 US 64, 58 S. Ct. 817, 82 L.Ed. 1188; Adelman v. Centaur Corp., (CCA Ohio) 145 F.2d 573. Therefore, if Arizona still follows the rule above set forth, the judgment of the District Court that ten (10%) per cent of the amount found to be due the Bank ($25,169.26, together with interest thereon at 6% from December 12, 1963) is unreasonable and failing to allow such sum is obviously error, its

judgment must, to that extent, be reversed and the Bank must be allowed that amount as its attorneys' fees.

The answer of the Trustee cites an Idaho case and a Texas case to support his position. These cases are, of course, not persuasive as the Arizona Supreme Court has already spoken in this matter as above noted, and its law must be followed.

The appellees Pacific and Martin cite the recent case of Elson Development Co. v. Arizona Savings and Loan Association, 99 Ariz. 217, 407 P.2d 930, for the proposition that Arizona has now adopted the rule that the payee of a note must introduce affirmative evidence of the reasonableness of a stipulated attorney's fee to recover. This is not the holding of the Elson case.

Elson Development (supra) was an appeal from a summary judgment granted the payee of a promissory note against the maker. The stipulation in the promissory note did not state a specific amount or percentage as attorneys' fees, but rather provided for a "... reasonable sum (not less than three (3%) per cent nor more than four (4%) per cent....." Elson Development Co. v. Arizona Savings and Loan Association (supra). Therefore, to begin with, the Court in that case was not dealing with a specific percentage provision, but only with a reasonable percentage, in which case some evidence must be introduced upon which the Court could grant attorneys' fees. Therefore, the case is not at all in point.

Secondly, in Elson, the

defendant-maker had answered denying that the amount alleged to be reasonable by the plaintiff-payee in his complaint was reasonable and affirmatively specifically alleged that it was unreasonable, setting forth a specific much lower amount which was alleged to be the maximum reasonable amount. The plaintiff-payee moved for and was granted summary judgment on these facts.

The Court held that:

> "The agreement in the instant case which provided for a reasonable sum - not less that three per cent nor more than four per cent - was indefinite as to the exact amount between three per cent and four per cent which would be reasonable. ... Under the holding of this Court in Crouch v. Pixler, supra, evidence was required to determine the amount of a reasonable attorneys fees." Elson Development Co. v. Arizona Savings and Loan Association (supra)

Obviously then, the Court was merely holding that where the issue of unreasonableness was raised, and where the amount stipulated was indefinite, there was a fact issue which would preclude the Court from properly granting a motion for summary judgment.

The Court in the Elson Development case not only did not overrule the cases cited by Bank in its Opening Brief but stated as follows:

> "This Court has long recognized the right of parties to a note to agree on the amount of attorney's fees, by providing that the same shall be fixed at a reasonable amount. ...a definite percentage of the amount recovered or a specific amount." Elson Development Co. v. Arizona Savings and Loan Association (supra)

The last contention of cross-appellees Pacific and Martin is patently invalid. It is obvious

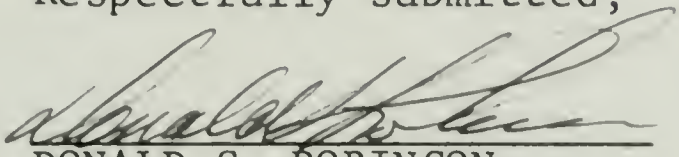
from the face of the pleadings, findings and judgment that not only did Bank place the promissory note in the hands of an attorney for collection but that it did collect the balance due thereunder, $26,169.20 plus interest. Cross-appellees can, then, hardly contend the note was not placed in an attorney's hands for collection.

C O N C L U S I O N

In conclusion, it appearing again that Arizona has adopted the rule that a stipulation for a specific percentage of a promissory note to be allowed as attorneys' fees must be honored by the Court in the absence of evidence of the unreasonableness thereof, and that such rule is still the law of the State of Arizona and there having been

no evidence whatsoever of the unreasonableness of the stipulation for attorneys' fees in the promissory note in the instant case of ten (10%) per cent of the amount found to be due, it was clearly error for the District Court to find that such an amount was unreasonable and to fail to allow the Bank that amount as its attorneys' fees. The judgment should be reversed to that extent.

Respectfully submitted,



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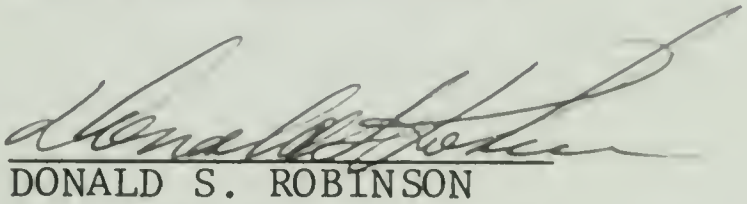
I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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